

# **ISC-Intel Agreement**

## **Frequently Asked Questions**

**ISC provides the following responses to frequently asked questions regarding the ISC-Intel agreement. The responses are for informational purposes only and are not intended as final legal positions of the ISC. The ISC reserves the right to modify its responses to the following questions at any time.**

### **Q1) Why is ISC proposing to enter into this agreement?**

The agreement improves the ISC's Rio Grande Compact management capabilities. Intel will provide to the ISC 740.9 acre-feet per year of consumptive use pre-1907 surface water rights ("Water Rights") and \$10 million. In addition, the agreement provides that Intel will extinguish its license to pump 3248.6 acre-feet of groundwater once it ceases pumping thus helping to bring middle Rio Grande valley water use closer to balance with supply. For its part, the ISC will assume an obligation to offset certain future stream depletion that result from Intel's groundwater pumping. The ISC will meet these obligations with the Water Rights acquired from Intel and with Compact relinquishment credits which will be set aside for this purpose. No other water or rights will need to be acquired by the ISC.

The agreement will yield additional important benefits to the state and its water users:

- The Water Rights can be put to use for important environmental purposes to help provide protection and insulation from Endangered Species Act threats in the middle Rio Grande valley. The money can be used for the same purposes, as well as for the Strategic Water Reserve. These ESA protections will not only benefit the state in meeting its Compact obligations, but will also benefit all middle Rio Grande water users.
- It ensures full offset of all future Intel stream depletions to middle Rio Grande Water users and the Rio Grande Compact.
- It reduces the transfer of water rights out of agriculture.
- It improves the competitive position of Intel's Rio Rancho plant relative to other Intel facilities, thus helping to keep thousands of jobs in New Mexico.

### **Q2) What is relinquishment credit?**

Credit water accrues under the Rio Grande Compact when New Mexico deliveries to Elephant Butte reservoir exceed the annual amounts required by the Compact. See Rio Grande Compact, Article I. New Mexico may relinquish (or transfer) accrued credit water to Texas. See Rio Grande Compact, Article VII. If Texas accepts the relinquishment, New Mexico is entitled to store a like amount upstream in future years (this entitlement is referred to as a "relinquishment credit"). See *id.* This year, for example, New Mexico offered to relinquish 80,000 acre-feet on May 15, 2010 and Texas accepted. Therefore, the relinquishment converted 80,000 acre-feet of

New Mexico credit water in Elephant Butte Reservoir to usable Rio Grande Project water in the reservoir. In exchange, New Mexico is now entitled to store 80,000 acre-feet of water for use within the Rio Grande Basin upstream of Elephant Butte Reservoir when it would otherwise be prohibited from doing so.

**Q3) Who has authority over the allocation of relinquishment credit?**

The Rio Grande Compact Commissioner for New Mexico has authority over the allocation of relinquishment credit. See Rio Grande Compact, Article XII.

**Q4) Can the ISC use relinquishment credit allocated to it to meet the ISC's obligations under the agreement?**

Yes, provided relinquishment credit has been allocated to the ISC by the Rio Grande Compact Commissioner for New Mexico. See Rio Grande Compact, Article XII. The ISC manages New Mexico's rights and obligations under eight interstate stream compacts pursuant to its broad statutory authority to do any and all things necessary to protect, conserve, and develop the waters and stream systems of the state, interstate and otherwise. NMSA 1978, § 72-14-3.

**Q5) Is relinquishment credit subject to the prior appropriation doctrine?**

No. Relinquishment credit is not subject to appropriation because it is not a water right or water that is otherwise governed by the prior appropriation doctrine. Rather, relinquishment credit results in water that becomes available at certain times *outside* of the prior appropriation system, as a consequence of the Rio Grande Compact. See Compact, Article VII. The Compact is an agreement between New Mexico, Texas, and Colorado, which has been ratified by the New Mexico Legislature and enacted by the United States Congress. In accordance with the Rio Grande Compact, the Rio Grande Compact Commissioner for New Mexico administers the provisions of the Compact, including offering to relinquish credit water to Texas and the resulting relinquishment credit (entitlement to store) on behalf of the state. See Rio Grande Compact, Articles VII and XII. Moreover, because relinquishment credit is not subject to the prior appropriation doctrine, it is not within the jurisdiction of the Office of the State Engineer ("OSE").

**Q6) Is the agreement consistent with the State Water Plan?**

Yes. More specifically, it is consistent with and furthers the priorities, goals and objectives of Section C.1 of the Plan to:

- Protect senior water rights,
- Provide for fish and wildlife habitat preservation and maintenance and for river restoration,
- Maintain and enforce interstate stream compact compliance, and
- Preserve state administrative authority over the state's waters.

It is also consistent with and supports the goals of Section C.8 of the Plan: to “Promote river riparian and watershed restoration that focuses on protecting the water supply, improving water quality and complying with federal Endangered Species Act of 1973 mandates”.

**Q7) Does the agreement relate to the previous OSE policy of dedication?**

No. The previous policy of dedication (approving a water right conditional upon future retirement of unidentified existing rights without public notice and opportunity for public comment/protest) was questioned by the Attorney General because it precluded full consideration of public welfare, conservation and impairment to existing water users and violated procedural due process requirements by failing to provide public notice and an opportunity for public comment or protest. See Op. Atty Gen. No. 94-07 Revised, 12/23/94. By contrast, the water rights Intel will convey to ISC as partial consideration for the agreement, and which Intel originally acquired as future offset rights to satisfy its stream depletion impacts, have fully conformed to the standard State Engineer transfer process; that is, notice of the transfers was published and an opportunity for comment or protest was provided to the public, and the OSE evaluated each transfer with respect to impairment, conservation and public welfare.

**Q8) What OSE processes are contemplated by the agreement?**

There are three OSE processes required by the agreement. First, Intel will complete the transfer of the Water Rights into its wells. All of the Water Rights transfers have been subject to public notice and protest in accordance with §§ 72-5-23, -24. Second, the ISC and Intel will submit to the OSE an Offset Plan. See Q9, below. Finally, the ISC and Intel will jointly file an application with the OSE to change the purpose and place of use of the Water Rights. This application will be subject to notice and protest in accordance with §§ 72-5-23, -24.

**Q9) What is an Offset Plan?**

The Offset Plan is an artifact of the agreement. The purpose of the Offset Plan is to explain how Intel and the ISC will satisfy a condition of approval of Intel’s underlying State Engineer license requiring Intel to offset its depletion effects to the Rio Grande (“condition of approval”) to the approval and satisfaction of the OSE.

**Q10) Will the Offset Plan be submitted to the OSE in the form of an application that undergoes public scrutiny?**

The Offset Plan will request OSE recognition of sources of offset available to ISC to satisfy Intel’s condition of approval. The Offset Plan is similar to a return flow plan because they both address the satisfaction of conditions of approval. Return flow plans are not subject to notice (see NMAC 19.26.2.11.E.3). While we do not believe that the Offset Plan constitutes a change to Intel’s condition of approval, even if it did, the State Engineer may modify a condition of approval without providing public notice of the change. See *City of Roswell v. Berry*, 80 N.M. 110 (1962). Notwithstanding the above, if the State Engineer requires that the Offset Plan be noticed, the parties will follow the procedure required by the State Engineer.

**Q11) Does the agreement require the approval of the State Legislature?**

No. The Legislature has already granted to ISC the necessary statutory authority to enter into the agreement. Under the ISC's general statutory authority, the ISC is empowered to "institute or cause to be instituted in the name of the State of New Mexico any and all negotiations and/or legal proceedings as in its judgment are necessary to carry out the provisions of this act" [to do any and all things necessary to protect, conserve and develop the waters of the state, including interstate waters]. § 72-14-3. Moreover, the ISC may acquire water rights, including interests in permits and licenses issued by the State Engineer, that are necessary and proper to conserve, develop and utilize water. § 72-14-10. Negotiating and consummating this Agreement is within the ISC's statutory powers under both §72-14-3 and §72-14-10.

Moreover, the Strategic Water Reserve Act provides ISC the authority to enter into this Agreement. The Act mandates that the ISC establish a reserve using leased, purchased or donated water, water rights or storage rights. In this case, the Water Rights to be conveyed by Intel to ISC will ultimately be deposited into the Middle Rio Grande Reserve, a priority reach for the acquisition of water rights. The ISC's use of water in the reserve is limited to two purposes: compliance with interstate stream compacts and management of water for the benefit of threatened and endangered species.

**Q12) Has the ISC given sufficient consideration to this agreement with respect to the Anti-Donation Clause?**

Yes. As is evident in the economic analysis requested by the ISC from New Mexico economist Dr. Lee Brown, the State is receiving sufficient consideration from Intel for its obligations in the form of 740.9 acre feet of senior water rights and \$10 million. Therefore, the agreement does not violate the Anti-Donation Clause of the New Mexico Constitution (N.M. Const., art. IX, Sec. 14). See generally *State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, ¶¶ 49-52, 141 N.M. 1, 150 P.3d 375. There is no requirement in state law that a public agency receive equal consideration for that which it has contracted; rather, sufficiency of consideration is the measure. In transfers of real property, sufficiency of consideration is frequently based on the "market value" or "present value" of the property.<sup>1</sup> Under the agreement, ISC is receiving 740.9 acre feet of water rights presently valued at approximately \$12 million, in addition to receiving \$10 million, for a total of approximately \$22 million as consideration for assuming the bulk of Intel's offset obligations. ISC intends to use approximately 30,000 acre-feet of relinquishment credit allocated to it to fulfill this obligation. The present value of 30,000 acre-feet of relinquishment credit is approximately \$3 million, based upon previous agreements with Bureau of Reclamation to provide it relinquishment credit at \$100 per acre-foot [ability to store 30,000 acre-foot relinquishment credit x \$100 per acre-foot=\$3,000,000]. Thus, ISC is receiving \$22 million in exchange for the use of \$3 million of relinquishment credit. Moreover, the state receives

---

<sup>1</sup> Although relinquishment credit is not an interest in real property, the ISC believes "present value" and "market value" are appropriate methods for valuing relinquishment credit.

additional benefits from the agreement, such as the future extinguishment of 3,248.6 acre-feet of groundwater pumping. The consideration received by ISC is clearly sufficient for the contemplated exchange, and the Anti-Donation Clause therefore is not implicated. See *id.*

**Q13) Does the agreement require State Board of Finance approval?**

No. The Board of Finance must approve any sale, trade or lease for a period of five years of real property belonging to a state agency or any sale, trade or lease of real property for more than \$25,000. § 13-6-2.1(A). The ISC's consideration for the agreement is the assumption of certain of Intel's depletion offset obligations. Because this does not involve a conveyance of real property by the state to Intel, the agreement is not subject to Board of Finance approval.

**Q14) Does the agreement violate Due Process?**

No, the agreement does not violate the due process clause of the Fourteenth Amendment of the federal Constitution (“[no State shall] deprive any person of life, liberty, or property, without due process of law.”). The procedural protections of the clause are built into the agreement and provided by the established OSE process. For example, the Water Rights will be transferred from Intel to the ISC pursuant to §§ 72-5-23, -24. That is, notice of the transfer will be published and an opportunity to protest will be afforded to the public. (See also response to Q7. All of the Water Rights transferred by Intel to its wells were subject to notice and protest). Additionally, the Offset Plan is the product of Intel's underlying State Engineer permit and license. The permit application was publicly noticed and protested. The Offset Plan merely explains how Intel and the ISC will satisfy a condition of approval of Intel's license requiring Intel to offset its depletion effects to the Rio Grande to the satisfaction of the OSE. We do not believe that the Offset Plan requires public notice and an opportunity for protest (see response to Q10). However, if the State Engineer requires that the Offset Plan be noticed, the parties will follow the procedure required by the State Engineer.

**Q15) Does the agreement violate Equal Protection?**

No, the agreement does not violate the equal protection clause of the Fourteenth Amendment of the federal Constitution (“[No State shall] deny any person within its jurisdiction the equal protection of the laws.”) There is no equal protection claim unless there is discrimination or differential treatment of similarly situated classes of persons. This agreement does not discriminate. Rather, the ISC is contracting with one party—Intel, arguably a unique corporate “person”. If a similarly situated class of persons were to approach the ISC about an identical agreement and if the state were in a similar position (i.e., having unallocated relinquishment credits available), the ISC would consider such an offer. See response to Q20.

**Q16) Why is the ISC in the “water rights ownership business”?**

The ISC has explicit statutory authority to acquire water rights (see, e.g. the Pecos water acquisition statutes [§§ 72-1-2.4, 2.6], the Strategic Water Reserve Act [§72-14-3.3], the general powers of the ISC [ § 72-14-3] and other statutory authorities. The ISC has been actively

involved in the water rights market in the Pecos and Rio Grande Basins for some time. Regarding the Intel agreement, ISC is in the “water rights ownership business” only to the extent necessary to fulfill our statutory charge.

**Q17) Why did the ISC not allow this agreement to be publicly reviewed and receive public input before now?**

Real estate and water rights transactions are usually negotiated in private before being made public. That is the reason why the Legislature, in its enactment of the Open Meetings Act, allows the Commission and other similar bodies to invoke executive session when discussing the acquisition of water rights. § 10-15-1(H)(8).

**Q18) Is the ISC bailing out Intel?**

No. The agreement is an equitable exchange. From a financial viewpoint, Intel is giving to the ISC \$10 million plus approximately 740.9 acre-feet of pre-1907 surface water rights. The total consideration of these assets greatly exceeds what the ISC is putting up for the agreement. The New Mexico water economist, Dr. Lee Brown of the University of New Mexico, in an independent analysis has valued this agreement at a ratio of 3 to 1 in favor of the state. The ISC’s own internal economic analysis actually yielded an even more favorable benefit to cost ratio of about 7 to 1 in favor of the state. Additionally, under the agreement, if Intel ceases pumping, it has agreed to extinguish its State Engineer license and permit to appropriate 3,248.6 acre-feet per year of groundwater. The value to the State of reducing approximately 3,248.6 acre-feet per annum ground water pumping in the fully appropriated Rio Grande basin is substantial.

**Q19) Does the State of New Mexico care whether Intel remains competitive in the state?**

One of the benefits of the ISC-Intel agreement is that it helps Intel with respect to its competitive position with its sister facilities around the world, thus ensuring that the Rio Rancho plant remains a viable operation. However, that is not why the ISC pursued the agreement. The reasons the ISC pursued the agreement is the opportunity it presents to secure pre-1907 surface water rights for the Strategic Water Reserve in the Middle Rio Grande and elsewhere, the funding it will provide for environmental projects within the MRG and the potential it presents to extinguish 3,248.6 acre-feet of groundwater rights. The fact that the agreement will help Intel remain competitive in New Mexico was a principal motivation for Intel in pursuing the agreement and we see nothing wrong in pointing out that the agreement helps to ensure that Intel’s 3,000+ jobs will remain in New Mexico for the foreseeable future. This is critical given the current high levels of unemployment in New Mexico and the rest of the nation.

**Q20) Will the ISC be forced to sell relinquishment credit to the highest bidder?**

No. The agreement is a unique transaction with a unique party. Intel is providing 740.9 acre-feet of pre-1907 water rights and \$10 million and agreeing to extinguish its right to pump 3,248.6 acre-feet of groundwater when pumping ceases. These assets provided by Intel will help the ISC better manage its statutory water management charges. Intel is giving up the Water Rights

it has acquired for future offset purposes and providing \$10 million to further enhance the ISC's water management efforts. The agreement also provides for the eventual extinguishment by Intel of its license to appropriate groundwater, which will further enhance the ISC's water management efforts. There are few, if any, ground water users in the basin that could provide such assets to ISC, including municipalities and public water suppliers. The ISC would not consider entering into any similar agreements with other entities unless they could also improve our water management capability.

**Q21) Will the agreement disrupt the water rights market?**

No. Actions of public bodies are part of the overall market. This agreement represents a small percentage of the overall amount of water rights available for transfer. The market will easily equilibrate to compensate for the Water Rights transfer.

**Q22) How will local stream depletions that might otherwise affect middle Rio Grande valley water users be offset?**

Local stream depletions will be offset by a combination of Intel return flows and the pre-1907 surface water rights acquired from Intel. In other words, local stream depletions will always be offset with wet water.

**Q23) Will relinquishment credit be used to offset local stream depletions?**

No, relinquishment credit will not be used to offset local stream depletions. The stream depletions caused by Intel's pumping impact both local, or middle valley, water users such as MRGCD and the Middle Rio Grande Pueblos, as well as New Mexico's deliveries to Elephant Butte Reservoir as required by the Rio Grande Compact. In fact, over time the majority of Intel's stream depletions affect deliveries to Elephant Butte Reservoir, and not local water users. Relinquishment credit will only be used to offset that portion of the stream depletions which affect deliveries to Elephant Butte Reservoir. Only the Water Rights acquired from Intel and Intel return flows will be used to offset all middle Rio Grande impacts.

**Q24) How will relinquishment credit be used to offset Elephant Butte Reservoir stream depletions?**

There are a number of ways that relinquishment credit may be used to offset that portion of Intel's stream depletions which impact New Mexico's Compact deliveries to Elephant Butte Reservoir. The first is very similar to the way in which a pre-1907 surface water right retired from agricultural use offsets the local portion of the stream depletions caused by Intel and other groundwater pumpers. That right is retired and instead of being exercised at the old place of use, the water remains in the river available for use by the local entities impacted by the groundwater pumping. Similarly, instead of storing and consuming the relinquishment water, it could be allowed to remain in the river and thus flow downstream and into Elephant Butte Reservoir and be available for use downstream.

Another way would be to store the relinquishment credit, and, instead of it being used and consumed by some party in the upper or middle Rio Grande, it would be released during the winter time and allowed to flow downstream to Elephant Butte Reservoir.

Yet another way may be to trade the relinquishment credits to some third party and have it offset the Elephant Butte Reservoir portion of the stream depletions.

**Q25) Is the ISC setting precedent by proposing to use relinquishment credit /credit water for a private entity?**

No. Water is used throughout New Mexico by private entities for all sorts of purposes. In this case, relinquishment credit is not being allocated to a private entity. Instead, the ISC will be using relinquishment credits allocated to it for offset of a portion of Intel's stream depletion impacts to the Rio Grande in exchange for substantial consideration. This approach is consistent with previous use by the ISC of relinquishment credit and credit water since 2001. In 2001, we entered into the Conservation Water Agreement with the United States. In 2003, the ISC entered into the Emergency Drought Water Agreement (EDWA) in which the federal government was allowed to use a certain amount of relinquishment credits and Rio Grande Compact delivery water in exchange for consideration. The EDWA was amended in 2008 to provide additional relinquishment credits for the same purposes.

**Q26) Is it bad public policy to use groundwater for offset purposes?**

In general it is. But the amounts of pumping for such purpose in this instance are so small as to be essentially irrelevant in relationship to the total amount of groundwater pumping currently occurring in the basin. Under the agreement, such pumping would only be done in very limited amounts, for limited time, and for specific reasons. We do believe that pumping for the purposes of offset for long periods of time for large amounts makes no sense. Such longer-term pumping simply results in the need for additional offset, setting up a scenario of perpetual pumping trying to catch up with perpetual offset needs.

**Q27) Does augmentation pumping under the agreement constitute a new "purpose of use?"**

No. Augmentation pumping as contemplated under the agreement merely provides return flow within the scope of the Intel license.

**Q28) Will this agreement affect delivery of water to southern New Mexico?**

No. This agreement will have no impact to delivery of water to Elephant Butte Reservoir for use in southern New Mexico.

**Q29) Will this agreement take water away from the Middle Rio Grande Conservancy District (MRGCD) and other senior water right holders like the Pueblos?**

No. The Pueblos and the individual irrigators within MRGCD will have the same amount of water regardless of whether ISC enters into this agreement or not. The agreement does not affect the Pueblos or the MRGCD parties in any way, except to the extent that it provides New Mexico with additional means to help protect senior water rights from potential Endangered Species Act threats.

**Q30) The Rio Grande basin has no extra water and is in a long-term deficit. Will this agreement exacerbate projected deficits?**

No. The agreement does not result in an increase in water use in the basin. The basin is fully appropriated and any new use of water must come from an existing use. The logic behind Intel's permit and license is this: Intel pumps groundwater, which in turn pulls water out of the Rio Grande, and so Intel is required to fully offset all the water that comes out of the river by either return flows or by retirement of pre-1907 surface water rights that are currently being consumed in agricultural production. The agreement calls for the ISC to offset a portion of the water that Intel's pumping pulls from the river. Whether that offset comes from a prior relinquishment (and accounted for with relinquished credits), from pre-1907 surface rights currently being used in agricultural production or from some other source, the agreement will not result in an increase in the overall amount of water use in the basin. That is because the offset water, no matter its source, will come from some other use which ceases. So, instead of exacerbating projected long-term deficits, the agreement does just the opposite, since it will result in the eventual extinguishment of over 3,000 acre-feet of groundwater use, thus bringing the basin a little closer to within balance.

**Q31) Are Intel's return flows the property of the Albuquerque-Bernalillo County Water Utility Authority?**

No. Since 1995, the City of Albuquerque (now the Albuquerque-Bernalillo County Water Utility Authority (Authority)) has been treating Intel's wastewater return flows and discharging them to the Rio Grande. In 1993 and 1994, Intel and the Authority executed agreements in which the Authority, in exchange for valuable consideration, agreed that Intel "has the right to all water right return flow credits corresponding to the portion of the Intel wastewater discharge attributable by measurement to Intel". Since that time, Intel has submitted semi-annual reports to the State Engineer showing the amount of its wastewater discharge delivered to the Authority's wastewater treatment plant and the calculated amount of its return flow credits. At the same time, the Authority submits monthly reports to the State Engineer showing the amount of its wastewater discharge to the Rio Grande, after subtraction of Intel's return flow credits, which prevents double counting of return flow credits.